CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

CHARLES J. HYNES
District Attorney
Kings County

LEONARD JOBLOVE*
VICTOR BARALL
CAMILLE O'HARA GILLESPIE
Assistant District Attorneys

Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201-2908
(718) 250-2511

* *Counsel of Record for Petitioner*

August 3, 2005

No. 04-1520

Supreme Court, U.S.
FILED
OCT 18 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

GUY ZAPPULLA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REDACTED REPLY BRIEF FOR PETITIONER

CHARLES J. HYNES
District Attorney
Kings County

LEONARD JOBLOVE*
VICTOR BARALL
CAMILLE O'HARA GILLESPIE
Assistant District Attorneys

Kings County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201-2908
(718) 250-2511

* *Counsel of Record for Petitioner*

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

In opposing the petition for a writ of certiorari, defendant mischaracterizes the facts in the record relating to the first question presented in the petition, which is whether, and under what circumstances, warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), lose their efficacy because of the passage of time. In addition, defendant attempts to trivialize the recurring controversy among the federal courts of appeals relating to the second question raised in the petition, which is whether *Brecht v. Abrahamson*, 507 U.S. 619 (1993), applies to post-AEDPA claims of trial error. However, defendant fails to show that either of the two questions raised by the petition is unworthy of the Court's review.

1. Although defendant attempts to trivialize the debate over whether the applicable standard of harmless error is the *Brecht* standard or an unreasonable application, under section 2254(d)(1), of *Chapman v. California*, 386 U.S. 18 (1967), and suggests that the question of which standard all federal courts should apply before undoing a state conviction scarcely matters (Brief in Opposition ["Br. Opp."] at 16-17), defendant is way off the mark. First, the issue of which standard federal courts should apply to habeas review of state convictions matters enormously to all of the states, as well as to all state prisoners who seek federal habeas relief, because the resolution of that issue potentially affects every state prisoner's claim of constitutional trial error found harmless by the state courts.

For the same reason, this issue should matter, and evidently does matter, to the federal judiciary. Defendant's opposing brief lists numerous federal cases in which the issue of the application of *Brecht* after AEDPA has been raised, in various permutations, and in which the divided views of the courts of appeals have been aired and commented upon (Br. Opp. at 22-25 & n.13). Defendant expressly acknowledges, as he must, that there is a conflict in the circuits on the issue (Br. Opp. at 16), despite his pains to distinguish and minimize this conflict.

The frequency with which the question of the *Brecht* standard's application after AEDPA continues to arise signals that the question is an important and appropriate one for this Court's consideration. A significant body of decisional law has developed, adding to and informing the debate about the appropriate standard and rendering the controversy ripe for the Court's determination. At least two of the courts of appeals have now considered en banc whether the *Brecht* standard applies after AEDPA, both holding that *Brecht* does apply. *Herrera v. Lemaster*, 301 F.3d 1192 (10th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 1197 (2003); *Allen v. Lee*, 366 F.3d 319, 321-22 (4th Cir.) (en banc, per curiam), *cert. denied*, 125 S. Ct. 208 (2004).

This Court has previously recognized the need for consistency in the legal standards applied to habeas review of trial errors. *See, e.g., Calderon v. Coleman*, 525 U.S. 141, 145-46 (1998) (per curiam) (reversing Ninth Circuit, where it failed to apply *Brecht* test before granting habeas relief). Defendant's arguments opposing the State's petition overlook this Court's role in achieving consistency in such standards and preserving the balance of interests underlying the *Brecht* decision and the AEDPA amendments, a balance endangered by the

Second Circuit's incorrect interpretation of *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam).

Prior to AEDPA, the habeas statute itself "sa[id] nothing about the standard for harmless-error review in habeas cases." *Brecht*, 507 U.S. at 631. Although defendant asserts that the habeas statute, as amended by AEDPA, itself now supplies the harmless error standard for trial error in habeas cases (Br. Opp. at 27-28), that assertion is highly debatable, and given the conflict in the circuits, the Court is now the proper forum for that debate. "In the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies on collateral review . . . ." *Brecht*, 507 U.S. at 633.

Contrary to defendant's arguments, the circumstances of the present case make the question of whether *Brecht* remains applicable after AEDPA particularly well-suited for the Court's review at this time. First, whether or not *Brecht* is applied in this case apparently makes a difference in the outcome. The district court applied *Brecht* and denied habeas relief, but the Second Circuit, without applying *Brecht*, granted habeas relief. Moreover, the Second Circuit, describing AEDPA's unreasonable application standard in section 2254(d)(1) as "somewhere between 'merely erroneous and unreasonable to all reasonable jurists,' " has stated that the increment of incorrectness beyond error required before granting habeas relief to a state prisoner " 'need not be great.' " *Jones v. Stinson*, 229 F.3d 112, 119 (2d Cir. 2000) (quoting *Francis S. v. Stone*, 221 F.3d 100, 109, 111 [2d Cir. 2000]). Thus, the Second Circuit apparently does not read the unreasonable application standard to require substantial deference to a state court's determination that a constitutional error was harmless.

The fact that only two of the three judges on the Second Circuit panel agreed that habeas relief should be granted for defendant's claim and that the third judge dissented, concluding that there was "overwhelming" evidence of defendant's guilt (App. at 28a, 54a), further demonstrates that a difference in the standard used could tip the balance the other way. *See, e.g., Jones v. Polk*, 401 F.3d 257 (4th Cir. 2005) (holding that state court's harmless error determination was unreasonable application of *Chapman*, but that error was harmless under *Brecht*); *Turrentine v. Mullin*, 390 F.3d 1181, 1190-91 (10th Cir. 2004) (although state court determination of harmless error in jury instruction was "contrary to clearly established federal law," habeas claim based on instruction was rejected, because error was harmless under *Brecht*), *cert. denied*, 125 S. Ct. 2544 (2005).

Moreover, although this is not the first time that the question of whether the *Brecht* standard still applies after AEDPA has been raised in a petition for a writ of certiorari, this does appear to be the first case in which a court of appeals has refused to apply the *Brecht* standard before *granting* a state prisoner habeas relief on a post-AEDPA claim of constitutional trial error that the state court found harmless under the *Chapman* standard. None of the cases cited by defendant (Br. Opp. at 22-25) featured such a scenario. Thus, the facts and the posture of this case place the *Brecht* issue in sharp focus for the Court's examination.

In addition, by taking up the question of the application of *Brecht* in this case, this Court may well resolve uncertainty about the application of *Brecht* to cases in which the state court did not expressly undertake harmless error analysis under *Chapman*. If the Court ultimately agrees with the State that habeas relief for trial error should not be granted unless the error is harmful

under *Brecht*, notwithstanding a conclusion by the federal court that the state court's harmless error determination involved an unreasonable application of *Chapman*, then such a holding by this Court could effectively resolve the question of *Brecht*'s applicability for most, if not all, post-AEDPA claims of trial error, for it would make little sense to say that *Brecht* applies when the state court's harmless error determination involved an unreasonable application of the Court's precedents, but not when the state court rejected the prisoner's federal constitutional claim on the merits and thus had no occasion to make a harmless error determination.

Finally, even if the number of cases in which the harmless error standard determined the outcome were few, the social costs of retrial are significant, and the State "is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error." *Calderon*, 525 U.S. at 146; *see Brecht*, 507 U.S. at 637. As Judge Raggi pointed out in her dissent in this case, the cost of retrial is "borne not only by the state, but by victims, witnesses, the judicial system, and society itself," and should not be underestimated (App. at 54a).

2. In connection with the *Miranda* question, defendant misrepresents the state suppression hearing record when he asserts that after defendant was given *Miranda* warnings, defendant "told the police that he did not wish to answer any questions about the theft, as he did not want to go to jail" (Br. Opp. at 2) and "he specifically told the police that he did not wish to make a statement about the alleged theft for which he was arrested" (Br. Opp. at 10). Contrary to defendant's assertion, the hearing record contains no such statement by defendant. Although the record shows that in the interview of March 17, 1998, after *Miranda* warnings were given, defendant did not talk about the theft and burglary that the detective was

interested in investigating, the record does not contain any statement by defendant to the police saying that he did not wish to speak about the theft or otherwise expressing an invocation of his right to remain silent.

[Redacted]

Thus, defendant talked freely about matters other than the burglary and theft, and the fact that defendant did not say anything to Detective Delahunt about the burglary and theft does not mean that defendant invoked his right to remain silent.

Defendant also quotes hearing testimony out of context to suggest that he invoked his right to counsel (Br. Opp. at 3), and fails to acknowledge that defendant immediately made clear, without any questioning from the police, that he had not invoked his right to an attorney but rather was asking to have a district attorney present, because he wanted a written guarantee of the death penalty (Delahunt: H. 59-60; McMahon: H. 95-96, 100-02).

Defendant suggests that questions concerning his alleged invocation of his right to silence and his right to an attorney render the *Miranda* question presented by the petition unsuitable for review (Br. Opp. at 14), but that suggestion is unjustified. The Appellate Division articulated its reasons for finding that defendant's confession to the police should have been suppressed (App. at 77a-78a), but the Appellate Division did not give as one of those reasons that defendant had invoked either his right to remain silent or his right to counsel. Furthermore, nothing in the precedents of this Court or even those of the Second Circuit would have required the Appellate Division to find that defendant had invoked his right to remain silent or his right to counsel. *See Davis v. United States*, 512 U.S. 452, 459-61 (1994); *Edwards v. Arizona*, 451 U.S. 477 (1981); *United States v. Ramirez*, 79 F.3d 298, 305 (2d Cir. 1996) (defendant did not invoke right to remain silent, where he neither remained entirely silent nor stated that he wished to be asked no further questions), *cert. denied*, 519 U.S. 850 (1996); *Bradley v. Meacham*, 918 F.2d 338, 342 (2d Cir. 1990) (finding no invocation of right to remain silent, where defendant initially stated that he did not wish to discuss involvement in crime but immediately denied any connection to robbery and proffered explanation of his whereabouts at time of crime), *cert. denied*, 501 U.S. 1221 (1991).

In addition, defendant misrepresents the timing and sequence of events to suggest that the police caused defendant's visit to the hospital to be cut short so that the police could question defendant. Defendant asserts that at 12:30 a.m., after returning to the precinct following the discovery of Scarpati's body, the police learned that defendant was still at the hospital and "had him brought back to the stationhouse for the questioning at 1:15 a.m." (Br. Opp. 2-3). But the record shows that when Detective Delahunt returned to the precinct after discovering the body, defendant was not at the hospital; rather, defendant was present at the precinct when Detective Delahunt arrived there at about 12:30 a.m. (Delahunt: H. 68, 128, 135). Nor is there any indication that the police caused defendant's hospital visit to be curtailed so that they could speak to him. After the discovery of Scarpati's body at about 6:00 p.m., the police simply arranged for defendant to be returned from the hospital to the precinct instead of to Central Booking (Delahunt: H. 127-28, 133-35). Thus, defendant's assertion that the police "had him removed from the hospital around 1:00 a.m. so that they could speak to him" (Br. Opp. at 12) is wrong and misleading.

Moreover, although defendant tries to make much of the fact that defendant was taken to the hospital after his brief escape and was therefore not continuously in a "police custodial environment" (Br. Opp. at 12), there is no question that it was the police who took defendant to the hospital, and that while defendant was in the hospital, he remained in police custody (Delahunt: H. 127). Thus, the only break in custody occurred when defendant escaped from the police momentarily when he was being escorted to Central Booking.